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EXTRA-GOVERNMENTAL CENSORSHIP IN THE ADVERTISING AGE

Steven C. Schechter*

I. INTRODUCTION

"Throughout history, families and religious groups have recognized their influence over the lives of their members and have used this influence to maintain unity and adherence to a given set of values."¹ Vocal activists have for generations waged wars against works of literature and art that they have found offensive to their religious or moral beliefs.² They have attempted to exert their influence over society as a whole and to impose their values over all others. These activists believed that they were providing an invaluable service to society.

From the time of the colonization of the United States through the 1950's, moral activists had the weapon of choice on their side: the strong-arm censorship powers of the law and the courts. However, with the change in the law regarding offensive materials, the self-appointed censors were forced to find new weapons with which to wage their campaign against the materials they considered offensive.³ In the 1990's, the weapon of choice is the United States dollar bill. The new breed of moral activists have discovered that the quickest way to silence their enemy is with their wallets. These activists are taken very seriously by the art and

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1. Justin K. Miller, *Damned If You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271 (1988).

2. Literature has been sexist throughout time. As one commentator notes: The Muses never sang to the poets about liberated women. It's the same old *chanson* from the Bible and Homer through Joyce and Proust. And this is particularly grave in the classics after politics was perched These books appealed to the eros while educating it. So activism has been directed against the content of books.

ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 65 (1987).

3. Zdena Nemeckova, Note, *A New Strategy for Censorship: Prosecuting Pornographers as Panderers*, 6 CARDOZA ARTS & ENT. L.J. 539, 540-57 (1988). In this article, all organizations, persons and associations that strive to prohibit or control the publication, creation, distribution or exhibition of any material, art work or other media based upon the content thereof shall be referred to as "censors." When these organizations or persons are not governmental or prosecutorial in nature, they will also sometimes be referred to as "private censors" and their actions referred to as "censorship" or "private censorship." Ordinarily, the term "censorship" only refers to governmental action.

media communities.⁴

In contemporary America, the media and art communities rely heavily on money to create, distribute and exploit their works. Most of these funds are derived from either business profits, private sponsorships or from the government. These sources of funds—private, corporate and governmental—are susceptible to outside influences over the way in which the money is distributed. The government is subject to lobbying pressures, while corporations operate, for the most part, with a profit motive. Private funds are subject to public pressures as well. Therefore, market forces and consumer boycotts can force corporate management to spend their funds in ways designed to maximize corporate profits, thereby avoiding controversy. Likewise, lobbying pressure can force governmental entities to distribute grants in a manner calculated to maximize the likelihood of their incumbent members' re-election. Public pressures can also force private sponsors to donate in ways that avoid negative publicity.

Both the censors and the artists are aware that "the right to speak is worthless if your audience can't hear you."⁵ The advertiser boycott has thus effectively replaced the government's injunction as a means to silence viewpoints and expressions that offend the tastes of the moral activists. Economic boycotts have become the most effective form of censorship because they bypass the law and stem the artists' and media's funds, ultimately cutting off their abilities to create and distribute their materials.

Although these boycotts are not always successful in attaining their immediate goals, which include the halting of distribution of a particular film or television program, they nevertheless create genuine pressures on the media and art communities. The boycotts cause those communities to contemplate possible economic backlashes and negative publicity. These boycotts are usually initiated by moral activist organizations in response to content that the organizations consider offensive to their moral or religious values. The ever-threatening presence of moral activists also has the effect of "spooking jittery advertisers away from [television] shows"⁶ that may be regarded as offensive by the self-proclaimed moral champions of the country.

4. See, e.g., *David and Goliath*, ELECTRONIC MEDIA, Jan. 8, 1990, at 12.

5. Robert Posch, *Price Censorship Is Real and Growing*, COMM. LAW., Fall 1990, at 15.

6. See *David and Goliath*, *supra* note 4.

A. *A Brief History of Censorship in America*

Societal suppression of speech is deeply rooted in history.⁷ Throughout recorded history, however, little need existed for moral activists or other citizens to monitor artists or media. The British and, later the United States, governments sufficiently legislated and enforced their societies' mores to satisfy the most prudent citizens. Such governmental enforcement of morality continued in the United States until the 1960's, when the legal tide changed. The courts began to recognize that works of art, as with other speech, did not lose constitutional protection merely because some people found them morally offensive or in bad taste.

By 1973, the law in the United States placed on such works of art, and speech in general, a presumption that they were constitutionally protected. Consequently, the government lost, to a great extent, its ability to silence offensive art and other offensive speech. Yet, many in society continued to respond negatively to exposure to certain works of art and types of speech. Those offended citizens took action into their own hands. If the government would not suppress the speech, they would find a way to do so.

B. *Early Moral Activists in the United States*

There have always been members of society who would prefer censorship of all materials and publications that they consider offensive. In the United States, many of them have organized groups to engage in private censorship. For the most part, these private citizens were able to work with the government. They supplied evidence and filed criminal complaints against booksellers and others who dealt with materials that they disliked. Working in conjunction with law enforcement agencies, these groups were able to stop the circulation of offensive materials and to punish those who published or sold it.⁸

Beginning in about 1875, with the law on their side, "groups of citizens began calling for censorship action. Fiction of all types became suspect, classics as well as dime novels . . . American society . . . seem[ed] to have suddenly crystallized into an organized censorship movement."⁹ Many of the activists believed that morals and religious

7. See generally ALEC CRAIG, *SUPPRESSED BOOKS, A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY* (1963).

8. Private organizations devoted to censorship of offensive material had sprung up in England in the early 1800's and had been successful in suppressing works which they perceived as immoral. See, e.g., *FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY* 12 (1986) [hereinafter *FINAL REPORT*].

9. FELICE FLANNERY LEWIS, *LITERATURE, OBSCENITY & LAW* 8-9 (1976). The ac-

views in society were disappearing, as a result of the industrial revolution. They set out to stop this process. The success of their efforts is illustrated by the activities of Anthony Comstock.¹⁰

Comstock worked as a dry goods clerk and then as a salesman in New York City, after a stint in the Civil War with the Seventeenth Connecticut Volunteers.¹¹ In 1868, offended by what he considered to be declining social mores, Comstock managed to have two booksellers arrested under New York's obscenity law.¹² In 1872, Comstock found support for his cause in Morris Jesep, the president of the YMCA. Jesep had lobbied in support of New York's obscenity law in 1868. Comstock persuaded Jesep to form a separate splinter-organization of the YMCA devoted to censoring materials that the two men considered obscene. The new organization was called the YMCA Committee for the Suppression of Vice.¹³ In 1873, the name was changed to the New York Society for the Suppression of Vice, and Comstock was named its Secretary.¹⁴ It was incorporated by a special act of the New York Legislature, and under the New York Penal Law, Comstock was given the power to make arrests for violations of the laws against obscene literature.¹⁵ Comstock's motto was "MORALS, Not Art or Literature,"¹⁶ and his primary argument was that offensive material corrupted the morals of youth.¹⁷

In 1873, Comstock was made a Special Agent of the United States Postal Service. Although it was a non-salaried position, Comstock nevertheless gained significant political power and was able to persuade Congress to enact sweeping anti-obscenity legislation in 1873.¹⁸ As a Special Agent, Comstock had access to any post office and could open mail that

tivist movement against obscenity began in major cities such as New York and Boston. The rural conservatives and Protestants were preoccupied during the late nineteenth century with supporting "the free silver campaign and the populist anti-business crusades of William Jennings Bryan." FITZGERALD, *CITIES ON A HILL* 177 (1986). Thus, these groups did not join the anti-obscenity and fundamentalist movement until the populist movement died in the 1920's. *See id.*

10. Under section 470 of the Postal Laws and Regulations of 1924, indecent and obscene material were non-mailable and could be confiscated by the Postmaster. *See American Mercury, Inc. v. Kielym*, 19 F.2d 295 (2d Cir. 1927). The Postmaster had broad discretion to determine which materials were non-mailable and the courts would only interfere where he was "clearly wrong." *Id.* at 297.

11. LEWIS, *supra* note 9, at 9-10.

12. *Id.* at 10.

13. *Id.*

14. *Id.*

15. *Dreiser v. John Lane Co.*, 183 A.D. 773, 171 N.Y.S. 605 (1st Dept. 1918).

16. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 65 (1938).

17. *See* LEWIS, *supra* note 9, at 29.

18. Alpert, *supra* note 16, at 65.

he suspected to contain obscene material.¹⁹ In the first six months following December 1873, Comstock claimed to have seized "194,000 obscene pictures and photographs, 134,000 pounds of books, 14,200 stereo plates, 60,300 'rubber articles,' 5,500 sets of playing cards and 31,150 boxes of pills and powders, mostly 'aphrodisiacs.'" ²⁰ By 1874, Comstock "had traveled 23,500 miles by rail in his efforts to stamp out obscenity."²¹ Among the literary works that Comstock managed to suppress were Theodore Dreiser's *The Genius* in 1918, and Gautier's *Memoirs of Mademoiselle de Maupin* in 1920.²²

Comstock's success had ramifications well beyond the borders of New York City. Organizations similar to his popped up throughout the United States.

After Comstock was appointed a Post Office agent he extended his crusade beyond New York, encouraging other communities to organize anti-vice groups. He was directly involved, for instance, in the formation of the New England Society for the Suppression of Vice, later renowned as the Watch and Ward Society. Although occasionally criticized for the indiscriminate and callous manner in which he conducted his crusade (he once boasted that he had caused fifteen suicides), his success in promoting censorship may perhaps be measured by the fact that from 1870 to 1890 the courts in at least thirteen states heard a wide variety of obscenity cases, in contrast to the handful that are known to have been prosecuted before 1870.²³

The censorship efforts of these moral activist organizations resulted in self-censorship by publishers of the works they published.²⁴ For instance, author Stephen Crane was unable to find a publisher for his book *Maggie: A Girl of the Streets* for six years. When Appleton Publishing finally agreed to publish it, the publisher forced Crane to remove potentially offensive words such as "damn," "hell" and "Gawd."²⁵ This self-restraint and self-censorship that was exercised by the creative community explains the scant number of obscenity cases on record between 1821

19. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE* (Mar. 2, 1990) (unpublished manuscript).

20. *Id.* at 4.

21. LOUIS EDWARD INGELHART, *PRESS FREEDOMS, A DESCRIPTIVE CALENDAR OF CONCEPTS, INTERPRETATIONS, EVENTS, AND COURT ACTIONS, FROM 4000 B.C. TO THE PRESENT* 207 (1987).

22. See *Halsey v. New York Soc'y for the Suppression of Vice*, 234 N.Y. 1 (1922).

23. LEWIS, *supra* note 9, at 11.

24. See generally DE GRAZIA, *supra* note 19.

25. LEWIS, *supra* note 9, at 20.

and 1870.²⁶ Additionally,

[a]nti-vice organizations from coast to coast, often with the co-operation of local police and district attorneys, developed a variety of pressure tactics to discourage the sale of books listed as undesirable, tactics that were effective enough for a time to make prosecution largely unnecessary.²⁷

Similarly, film censorship boards were set up in cities throughout the country to combat offensive films as the new technology grew throughout the early twentieth century.²⁸ These boards pressured many film producers and distributors to censor their films or refuse to release them for exhibition.²⁹ In 1915, the United States Supreme Court held that motion pictures were not entitled to any constitutional protection under the First Amendment.³⁰

John Sumner succeeded Comstock as the Secretary of the New York Society for the Suppression of Vice. Although Sumner lacked the leadership qualities exhibited by Comstock,³¹ the organization was able to suppress such books as *The Well of Loneliness* by Radclyffe Hall, *God's Little Acre* by Erskine Caldwell, and *My Life and Loves* by Frank Harris.³²

The Watch and Ward Society ("Society"), established in 1875 and

26. See *id.* at 6.

27. *Id.* at 136.

28. See generally ANNETTE KUHN, CINEMA, CENSORSHIP AND SEXUALITY 1909-25, 30-32 (1988).

29. In response to threats of government censorship, the United States motion picture industry established a system of self-censorship in the late 1920's. The industry established the "Production Code Administration" to make self-censorship rules, which were called the "Production Code."

The Administration, headed by Will Hayes and run by Joseph E. Breen, was the industry's reaction to threats of censorship on both the state and federal levels. "In 1921 alone, [legislators] in thirty-seven states introduced nearly one hundred bills designed to censor motion pictures." LEONARD J. LEFF & JEROLD L. SIMMONS, THE DAME IN THE KIMONO, HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE FROM THE 1920'S TO THE 1960'S 4 (1990).

Under the Code, morally offensive practices such as pre-marital sex and violent crimes could not be portrayed in motion pictures in a positive light. Movies were even forbidden from showing "the techniques of murder in any detail." GERALD GARDNER, THE CENSORSHIP PAPERS, MOVIE CENSORSHIP LETTERS FROM THE HAYES OFFICE, 1934 TO 1968 xxi (1987).

As a result of the Code, the Hollywood censors changed or altered the scripts or final versions of many motion pictures from 1930 to 1968, including such famous films as *Casablanca*, *The Treasure of Sierra Madre*, *The Postman Always Rings Twice*, *Rear Window*, *A Night at the Opera*, and even *Mr. Smith Goes to Washington*.

30. *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915); *overruled by Bur-skyn v. Wilson*, 343 U.S. 495 (1952).

31. See CRAIG, *supra* note 7, at 132.

32. See *id.*

led by Frank Chase, policed the bookstores in the Boston area, helping to bring criminal and civil actions against booksellers. One of the works that the Society helped to suppress was D.H. Lawrence's *Lady Chatterly's Lover*. The Society purchased a copy of the book at a Cambridge bookstore and delivered it to the police, who then arrested the bookstore owner.³³

The Society was also responsible for the suppression in Boston of Theodore Dreiser's acclaimed novel, *An American Tragedy*. The Society's members purchased a copy of this book from a Boston bookseller and then turned it over to the District Attorney, who obtained a criminal conviction of the bookseller.³⁴ Other books suppressed by the Society in Boston were *The Wayward Man* by John Ervine, *What I Believe* by Bertrand Russell, *Oil* by Upton Sinclair, *The World of William Clissold* by H.G. Wells, and Ernest Hemingway's *The Sun Also Rises*.³⁵ In fact, in the year 1929 alone, sixty-eight books were banned in Boston due to the Society's efforts.³⁶

In 1913, Boston booksellers and the Watch and Ward Society formed a joint committee to review questionable volumes.³⁷ If the committee decided that a book was obscene, the booksellers would voluntarily remove the book from their shelves and "most Boston newspapers cooperated by refusing to advertise or review such books. Later on, district attorneys and judges also tended to abide by this gentlemen's agreement, prosecuting and convicting only those dealers who defied the joint committee's warnings."³⁸

Such organizations thrived until the early 1940's, when the legal tide began to turn away from granting non-judicial tribunals the power of censorship.³⁹ In 1946, the United States Supreme Court ruled that the grant of unrestrained power of censorship to the Postmaster General was "abhorrent."⁴⁰ Although literary merit continued to be inadmissible as a defense in a prosecution for obscenity,⁴¹ many courts by the late 1940's admitted expert testimony regarding the literary or artistic value of a

33. See *id.* at 181-84.

34. See *id.* at 269-77.

35. See *id.* at 131-33.

36. See LEWIS, *supra* note 9, at 101-02.

37. *Id.* at 98.

38. *Id.*

39. By 1940, the New York Society for the Suppression of Vice had stopped vigorously enforcing the New York obscenity laws under the leadership of John Sumner. The organization "first changed its name, then merged [and became] the Police Athletic League." CHARLES REMBAR, *THE END OF OBSCENITY* 21 (1968).

40. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946).

41. See *People v. Friede*, 233 N.Y.S. 565 (1929).

work.⁴² Yet, under then existing standards, many literary works considered to have literary merit today, such as William Burroughs' *Naked Lunch*, were found obscene. This was particularly true for works that described sexual interludes in detail.⁴³

In 1952, the Supreme Court held that states had "no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."⁴⁴ Nevertheless, moral activist organizations, although not as active as they once had been, were far from extinct after the 1940's. Many religious groups and moralist organizations were formed in the 1950's to restrict material they found offensive. In 1955, an activist organization called the National Organization for Decent Literature was established in Chicago to suppress literature that threatened "moral, social, and national life." Its list of banned books included ones by Hemingway, Faulkner, Dos Passos, Orwell, O'Hara, and Zola.⁴⁵ In the 1950's, many moral activist organizations also waged war on the newly developed "rock and roll" music of the era, resulting in the expurgation of many songs and the banning of performances by some musicians.⁴⁶ By 1956, another activist organization, known as Citizens for Decent Literature, had established three hundred chapters throughout the United States;⁴⁷ in 1958, the Commonwealth of Massachusetts established an Obscene Literature Advisory Commission.⁴⁸

C. *Development of Obscenity Law*

The constitutionality of many obscenity laws was challenged in the 1950's, but the Supreme Court consistently upheld the statutes. In 1957, the Supreme Court in *Roth v. United States* ("*Roth*") held that, while the First Amendment protected literature and "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion,"⁴⁹ it did not protect "obscenity." The Court defined obscenity as "material which deals

42. See *Att'y Gen. v. Book Named "Forever Amber,"* 323 Mass. 302, 81 N.E.2d 663 (1948).

43. See, e.g. *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd* 208 F.2d 142 (9th Cir. 1953); *Att'y Gen. v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N.E.2d 819 (1950).

44. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

45. INGELHART, *supra* note 21, at 290.

46. See generally Wendy B. Kaufman, Note, *Song Lyric Advisories: The Sound Of Censorship*, 5 CARDOZO ARTS & ENT. L.J. 225 (1986).

47. INGELHART, *supra* note 21, at 291.

48. *Id.* at 292.

49. *Roth v. United States*, 354 U.S. 476, 484 (1957).

with sex in a manner appealing to prurient interest.”⁵⁰

The *Roth* Court stressed, on the other hand, that “[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press,”⁵¹ thus ensuring that serious literary and artistic works depicting sexual acts would not be censored as “obscene.” The obscenity test was “whether to the average person, applying contemporary community standards, the dominant theme of the materials taken as a whole appeals to prurient interest.”⁵² This required courts to apply the standard of the average adult person, and not a child, to the material as a whole. Under *Roth*, the offensive portion of the material had to relate to its dominant theme. This was a far more difficult standard to meet. Consequently, many books and other works previously banned as offensive were now freely distributed. Many critics remained offended by these works, however.

The 1960’s signaled a drastic change in the social mores of American society. As one author put it: “From the early sixties on there was a gradual testing of the limits on sexual expression, and they melted away or had already disappeared without anybody’s having noticed it.”⁵³ The change began with the civil rights movement. Society saw the introduction of social experiments such as free love, sex and widespread recreational drug use.

Reflecting the social change, the Supreme Court under the auspices of Chief Justice Warren also moved to the left. In 1964, the Supreme Court held that a state statute authorizing the seizure of allegedly obscene books solely upon a sworn statement by a police officer and without an adversarial determination of their obscenity, violated the First Amendment because it did not provide sufficient safeguards against the suppression of non-obscene books.⁵⁴ The Court found that, although the lower court judge had examined the books for about forty-five minutes before issuing a warrant authorizing the seizure of the books, the statute did not provide sufficient constitutional protection.⁵⁵ Rather, “[s]tate regulation of obscenity must ‘conform to procedures that will ensure against the curtailment of constitutionally protected expression.’”⁵⁶

In 1966, the Supreme Court decided the case of *A Book Named*

50. *Id.* at 487 (citation omitted).

51. *Id.*

52. *Id.* at 489.

53. BLOOM, *supra* note 2, at 98.

54. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

55. *Id.* at 208.

56. *Id.* at 210.

"John Cleland's *Memoirs of A Woman of Pleasure*" v. *Attorney General of Massachusetts*⁵⁷ ("*Memoirs*") in which it held that the State of Massachusetts could not censor the book commonly known as *Fanny Hill*. In *Memoirs*, Justice Brennan elaborated upon the *Roth* decision and held that, in order for any material to be censored as obscene,

[i]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁵⁸

Under *Memoirs*, a work had to be "utterly without" any social value in order to be found obscene. This very strict standard further thwarted government censorship and angered moral activists, who were now forced to see works they found offensive being legally sold, distributed, produced and displayed in their communities.

In *Miller v. California*,⁵⁹ however, the Supreme Court re-evaluated the obscenity standard, retreated from the *Memoirs* protection, and set forth a new tripartite test. In order to find a work obscene under the *Miller* test, the trier of fact must determine

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶⁰

Although the Court refused to adopt the *Memoirs* test of "utterly without redeeming social value," its *Miller* test is nevertheless a difficult standard to meet. The test appears to protect all materials except "hard core" pornography. The *Miller* Court recognized that, under its holding, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."⁶¹

Since offensive works and materials could no longer be easily labeled

57. 383 U.S. 413 (1966).

58. *Id.* at 418.

59. 413 U.S. 15 (1973).

60. *Id.* at 24.

61. *Id.* at 27.

"obscene," some cities and states attempted to censor them as a nuisance. In the case of *Erznoznik v. City of Jacksonville*,⁶² however, the Supreme Court held unconstitutional a municipal ordinance that prohibited, as a nuisance, drive-in theaters from exhibiting films portraying any nudity if visible from a public street. The Court found that it was the duty of the unwilling listener or viewer to avoid being offended "simply by averting [his or her] eyes."⁶³ Thus, the Supreme Court sent the message that if some individuals find material offensive, it is their duty to avoid contact with the offensive material rather than censor the material itself.⁶⁴

II. ADVERTISER BOYCOTTS

A. *Development of Advertiser Boycotts*

With the law no longer on their side, moral activists needed to find a new vehicle to suppress art and literature that they found offensive to serve as a substitute for the injunction and criminal information. The advertiser boycott became the new weapon of choice.⁶⁵ An advertiser boycott could easily be launched with a single television or newspaper report and quickly receive both media and corporate attention.

In 1979, a Missouri district court held that economic boycotts of businesses were constitutional and did not violate antitrust laws.⁶⁶ This decision was upheld on appeal.⁶⁷ In 1982, the United States Supreme Court held not only that non-violent boycotts were legal, but also that the boycotters could not be held liable for any economic injury caused by the boycott.⁶⁸ It was irrelevant, however, that the law encouraged the

62. 422 U.S. 205 (1975).

63. *Id.* at 211 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). See also *Redrup v. New York*, 386 U.S. 767, 769 (1967) (where the Court suggested that those offended by a publication have a duty to avoid exposure to it).

64. In 1989, in the case of *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Supreme Court reaffirmed the notion that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 420. Nor may expression be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace. *Id.*

65. Economic boycotts were used by civil rights activists in the 1960's. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights-motivated boycott occurring in 1966). The first successful boycott waged for political rather than labor reasons was probably the 1955 Montgomery bus boycott waged by Martin Luther King, Jr. King urged the black citizens of Montgomery, Alabama to boycott the city's buses to protest the racial segregation and mistreatment of blacks. See Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

66. *State of Missouri v. National Org. for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd* 620 F.2d 1301 (8th Cir. 1980).

67. *Id.*

68. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The Supreme Court held,

suppression of material that the boycott targeted. In most cases, the law prohibited governmental suppression of the material that was the subject of the boycott.

Advertisers are wary of bad publicity and go to extremes to avoid it. After all, most advertising is aimed at gaining a favorable reputation for products. Bad publicity can instantly ruin the reputation of products. Seeking legal redress against boycotters can lead to even more negative publicity than the boycott itself. Therefore, boycotts are effective because boycotters need not worry whether their actions violate the boycottees' rights: the boycottees usually do not dare to exercise any of their rights. Historically, the press had given much publicity to early boycotts staged by Reverend Wildmon against Sears, Roebuck & Company and other large corporations.⁶⁹

Oddly enough, the use of advertiser boycotts may have been encouraged by the United States government. During the Reagan administration, Attorney General Edwin Meese III investigated the sources and effects of pornography in the United States. In its 1986 Final Report, the Attorney General's Commission on Pornography suggested that citizens upset with pornography or indecent materials may use economic pressures, including

picketing and store boycotts, contacting cable casting companies[,] . . . contacting sponsors of television and radio programs with pornographic or offensive content and the use of the media to express public concern through letters to the editor and audience participation programs.⁷⁰

Thus, the United States government, acting under the specific request of the President of the United States⁷¹ and under legislative authority,⁷² actually encouraged citizens to use economic pressures to suppress materials deserving of constitutional protection.⁷³

however, that boycotters could be held liable for damages incurred as a result of violent activity. The Court found that the boycott activities were a form of speech protected by the First Amendment. *Id.* It is possible that a business that is the target of a boycott may be able to sustain an action in tort against the boycott organizers for interference with contractual or business relations. See *Feminist Women's Health Ctr. v. Mohammed*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (advice to young doctor to avoid plaintiff's clinic could be found coercive and give rise to claim for intentional interference with contractual relations).

69. See *infra* notes 103-149.

70. See *supra* note 8, at 337.

71. *Id.* at 3.

72. 86 Stat. 770 (1972) as amended by 90 Stat. 1241, 1247 (1976).

73. FINAL REPORT, *supra* note 8, at 337. The Commission suggested and even encouraged private censorship action by citizens who disagreed with the government's enforcement of obscenity laws. The Commission suggested that citizens

B. *The Advertiser Boycotters*

Generally, moral activists fall into three groups: individuals, local organizations, and large, national organizations. A single individual can successfully initiate a campaign that will result in the loss of funds for the media or art communities.⁷⁴ Local organizations often raise significant funds to support local boycotts or letter-writing campaigns. Large, nationally-organized groups have full-time staffs, employ attorneys, obtain vast amounts of funds and economic support, and are able to gain widespread publicity.

C. *The Boycotters' Views*

In June 1989, Senator Jesse Helms of North Carolina, a former broadcaster, summed up the viewpoint of the moral activists: "Prime time has degenerated into sleaze time and the American people are fed up."⁷⁵ Most moral activists believe that they are working in the interest of the majority of the American people by forcing the art and the media communities to impose self-censorship⁷⁶ and removing material they

may of course, form or join organizations designed expressly for the purpose of articulating a particular point of view. They may protest or picket or march or demonstrate in places where they are likely to attract attention, and where they will have the opportunity to persuade others of their views. The right of citizens to protest is of course coextensive with the right of publishers to publish, and we do not suggest that citizens not exercise their First Amendment rights as vigorously and as frequently as do those who publish their views in print, on film or tape, or over the airwaves We recognize that such forms of protest may at times discourage patrons who would otherwise enter such establishments from proceeding, but that, we believe, is part of the way in which free speech operates in the United States.

Id. The Commission further suggested that:

Citizens concerned about pornography in their community should initially determine the nature and availability of pornographic materials in their community, existing prosecution policies, law enforcement practices and judicial attitudes in the community. They should inquire whether these enforcement mechanisms are adequately utilized. They should determine whether the official perception of the current community standards is truly a reflection of public opinion.

Additionally, the Commission suggested that citizens engage in "citizen action in the area of lawful economic boycotts and picketing of establishments which produce, distribute or sell sexually explicit materials in the community." *Id.* at 330.

74. The significant effect that individuals and small groups of activists can achieve may be seen as evidence of the democratic system and the First Amendment in action. The Constitution was designed so that minority viewpoints and religious views would not be suppressed or overshadowed so that even individuals and small groups would have the opportunity to have their ideas and speech heard by the whole of society.

75. *What the Newsmakers Had to Say in '89*, ELECTRONIC MEDIA, Jan. 8, 1990, at 72.

76. The moral activists' assertion that they represent the majority of society is subject to dispute. However, one recent poll concluded that:

51% of females and 34% of males think theater showings of X-rated movies should be totally banned.

consider offensive from society.⁷⁷ Some believe that "[t]here are literally millions of our children and youth who are being told a grand lie about sexuality by pornographers, Hollywood, and the T.V. networks."⁷⁸

Most of the moral activists do not think that their activities constitute a form of censorship.⁷⁹ To them, "obscenity laws are not censorship [but] are necessary for our protection and well-being."⁸⁰ Activists rely on the fact that the Supreme Court has held that obscene material is not protected by the First Amendment.⁸¹

D. Effect of Boycotts on the Art and Media Communities

The threats of advertising boycotts by activists are taken seriously by the media and art communities.⁸² Although some members of the media and art communities consider moral activists to be "fanatic[s] who

43% of females and 29% of males think the sale or rental of X-rated video cassettes for home viewing should be totally banned.

50% of females and 41% of males think standards in their community regarding the sale of sexually explicit material should be stricter than they are now.

80% of females and 71% of males think magazines that show sexual violence should be totally banned.

61% of females and 45% of males think that pornography leads people to commit rape.

See DANIEL EVAN WEISS, *THE GREAT DIVIDE* 163 (1991) (relying on SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE (1987)).

Publishers Weekly reported that a ballot printed in 28 daily newspapers nationwide on April 23, 1990 resulted in the receipt of 50,000 completed ballots sent in by readers who identified themselves as opposed to censorship of any type. See Madalynne Reuter, *50,000 Respond to Anticensorship Ads*, PUBLISHERS WKLY., May 11, 1990, at 96.

Another poll conducted nationwide by the *Los Angeles Times* in September 1989 reportedly found that, of the 2,217 adults surveyed, "most Americans oppose any government efforts to regulate [television] programming Instead, they overwhelmingly believe that people should be allowed to make their own TV viewing choices—except for children. Even so, one-quarter of all parents say they are not imposing any restrictions in their own homes" and the people were "evenly divided in their support for boycotting advertisers to impose standards. But they resent efforts by social action and religious groups to make programming decisions for them." Overall, the poll found that "54% of Americans disapprove of social action groups that attempt to stop programs by pressuring advertisers. But the public is split evenly—with 47% disapproving and 45% approving—on advertiser boycotts in general." Jeff Kaye, *The Times Poll: Public Opposes Censoring Programs for Television*, L.A. TIMES, Sept. 24, 1989, at A1.

77. See generally DONALD WILDMON, *THE MAN THE NETWORKS LOVE TO HATE* (1989); see also *Leading The Attack On TV*, ELECTRONIC MEDIA, Jan. 8, 1990, at 72.

78. DONALD WILDMON, *THE CASE AGAINST PORNOGRAPHY* 10 (1986). The "pornography" to which Wildmon refers consists of *Playboy* and *Penthouse* magazines.

79. See, e.g., Bruce Ingram, *Radio a 'Cesspool of Smut and Filth' Sez Fundamentalist on NAB Panel*, VARIETY, Sept. 20-26, 1989, at 133.

80. WILDMON, *supra* note 78, at 22.

81. *Id.* at 22-23.

82. See *David and Goliath*, *supra* note 4, at 12.

claim to find filth in the most unlikely, innocuous places,"⁸³ most media and advertisers try to avoid being targeted by consumer boycotts.⁸⁴

Companies have come under increasing pressure from consumer groups in recent years and have acquiesced to various demands to avert protests or boycotts. As a recent spate of incidents indicate, companies appear to be becoming even more sensitive to even a hint of consumer outrage as the economy sours.⁸⁵

The mere threat of an advertiser boycott can sometimes scare the advertisers away. For example, in response to Reverend Wildmon's telephone call concerning General Motors' advertising on a program containing a sexually suggestive scene, the company's vice president of public relations commented that the management took Wildmon's concern very seriously. He explained that if the company were to "lose a car sale, that's a lot of money."⁸⁶ In fact, ABC has estimated that it lost about fourteen million dollars as a result of "advertiser defections" during the 1989-90 television season.⁸⁷ When sponsors withdrew from just a single episode of the program *China Beach* in 1990 because they feared a consumer boycott resulting from an abortion scene, ABC reportedly lost \$780,000.⁸⁸

Sometimes it is not readily apparent whether the publicity created by moral activists will help or hurt.⁸⁹ In an industry that is ever sensitive

83. Michael Rosenthal, *Wildmon Not Part of the Mainstream*, ELECTRONIC MEDIA, Sept. 24, 1990, at 10. See also Ingram, *supra* note 79.

84. Indeed, advertisers were wary of the content of the programming they sponsored even before the rise of advertiser boycotts. For example, "[i]n 1970, when NBC prescreened *Migrant*, its expose of the treatment of migrant farm workers, the Coca-Cola Company learned that part of the expose criticized its Florida citrus farms and demanded changes in the program. Perhaps because it is a major television sponsor, some of its demands were met." HERBERT J. GANS, *DECIDING WHAT'S NEWS* 256 (1980).

85. Paul Farhi, *Chrysler to Halt Ads in Playboy; Auto Firm Acts After Getting Complaints*, WASH. POST, Feb. 22, 1991, at C1. Television networks have been sensitive to interest-group pressures since the mid-sixties. See GANS, *supra* note 84, at 265.

86. Bill Carter, *Screeners Help Advertisers Avoid Prime-Time Trouble*, N.Y. TIMES, Jan. 29, 1990, at D1.

87. Wayne Walkins, *The Big 3 Button Up*, ADVERTISING AGE, Aug. 13, 1990, at 1.

88. Howard Rosenberg, *Advertisers Cooling off to Hot Topics*, L.A. TIMES, July 26, 1990, at F1.

89. See, e.g., *Battle of TV Protests Is Considered a Draw*, N.Y. TIMES, Nov. 1, 1991, at D7. In March 1989, in response to an advertiser boycott launched by Terry Rakolta against the television program *Married . . . With Children*, Gary Lieberthal, chairman of Columbia Pictures Television, which produced the show, stated: "Thank God the New York Times is giving us the kind of promotion we couldn't afford to buy." See *What the Newsmakers Had to Say in '89*, *supra* note 75. However, considering Columbia Pictures Television's ability to launch a widespread advertising campaign, Mr. Lieberthal's sincerity may be questioned.

to bad publicity, however, the entertainment, media and advertising communities are always cautious to err on the side of safety. These communities hold the belief that, "while it isn't clear how effective a boycott is, the threat of one and the attendant publicity can hurt."⁹⁰ Therefore, while advertisers realize that the moral activists calling for a boycott often represent a minority,⁹¹ they nevertheless are willing to incur significant expenses to prevent a boycott. Advertisers retain companies such as Advertising Information Services to screen television programs at all three major broadcast networks to spot potentially controversial or offensive scenes in programs sponsored by their clients.⁹² In fact, practically all prime-time network programs are screened before they are aired.⁹³

A July 1989 editorial in *Electronic Media*, a newspaper devoted to the broadcasting industry, acknowledged that as a result of boycotts and threatened boycotts, "[a]dvertisers are easily spooked these days . . ."⁹⁴ Because the television industry is financially dependent upon advertising, television producers, distributors and broadcasters are wary of advertisers' needs and desires and are careful not to offend their sponsors. Although they want free artistic license, broadcasters recognize that they need sponsors to pay for the programming.⁹⁵

One entertainment industry observer noted that the influence of moral activists such as Wildmon was so pervasive that one network actually canceled programs for lack of sponsors and all three television networks allegedly softened many shows to make them more appealing to sponsors.⁹⁶ The same observer also alleged that many advertisers removed their commercials from a made-for-television movie, *Roe v. Wade*, regarding the famous abortion case.⁹⁷ The television networks have become so reluctant to broadcast controversial programming out of fear of boycotts by moral activists that, in September 1991, NBC required producers to compensate the network for potential lost earnings. The program entitled *Quantum Leap* was scheduled to have a homosexual character who committed suicide. Originally, the homosexual character was to be a teenager. However, NBC was afraid that the episode

90. Verve Gay, *Rev. Wildmon's "Hit Parade": Mennen, Clorox Make List*, VARIETY, July 19-25, 1989, at 45.

91. *Bring on the Boycotts*, ELECTRONIC MEDIA, July 24, 1989, at 12.

92. See Carter, *supra* note 86.

93. *Id.*

94. *Bring on the Boycotts*, *supra* note 91.

95. Thomas Tyrer, "*Quantum*" Fight Sparks Free Speech Debate, ELECTRONIC MEDIA, Oct. 7, 1991, at 31.

96. Gay, *supra* note 90.

97. *Id.*

would generate bad publicity because it could be interpreted by moral activists as encouraging teen suicide. Because of the outcry from the moral activists (and the gay community), NBC reportedly forced the producers to change the homosexual character to an adult. Then, about a week before the episode was scheduled to be aired, NBC told the producers that it would not accept any financial responsibility for lost earnings. NBC reportedly asked the producers to reimburse the network for potential advertising defections up to \$750,000 and then altogether refused to pay the producers the license fee for the episode as written.⁹⁸ Ultimately, under pressure from both the network and the gay community, the program's producers opted to change the show's script.⁹⁹ NBC eventually reconsidered its position in the matter, and both the network and the show's producers denied being influenced by the outside pressures.

As a result of pressure by moral activists, advertisers recently took the initiative to create a thirty-six-page report entitled "Program Sponsorship/Resistance Analysis," dubbed the "hit list" by the media industry.¹⁰⁰ The report listed television programs and the advertisers who refused to sponsor them for any reason at all, including reasons having to do with internal marketing strategies, consumer pressures and fear of consumer boycotts. Although many advertisers claimed marketing or other reasons for refusing to advertise during many shows, a noticeably greater number of advertisers avoided programs with sexual themes or excessive violence.¹⁰¹ For example, the ABC sitcom *Roseanne*, which had not been subject to any advertiser boycotts, was avoided by only one advertiser. In contrast, the Fox Broadcasting Network's *Married . . . With Children*, which had previously been the subject of a consumer boycott led by Terry Rakolta, was avoided by forty advertisers. Some television programs were avoided by ninety or more advertisers.¹⁰²

The "hit list" is important because it demonstrates the number of advertisers avoiding sponsorship of certain programs. The very fact that such a list was compiled and distributed within the television industry evidences the ever-present pressure that consumer boycotts exert on the

98. See Tyrer, *supra* note 95, at 1. See also NBC Seeks "Quantum" Fee, ELECTRONIC MEDIA, Sept. 30, 1991, at 1; Gay "Leap" Flap, VARIETY, Sept. 30, 1991, at 38.

99. See Tyrer, *supra* note 95.

100. See "Hit List" Paints Picture of Advertiser Resistance, ELECTRONIC MEDIA, Feb. 19, 1990, at 31.

101. This may or may not be the result of advertiser boycotts. A recent survey, for example, has concluded that 77% of females and 51% of males "will stop watching a show if it's too sexy or violent." WEISS, *supra* note 76.

102. See "Hit List" Paints Picture of Advertiser Resistance, *supra* note 100.

entertainment industry.¹⁰³

III. EXAMPLES OF SUCCESSFUL BOYCOTTS

A. *Boycotts of Television*

1. The American Family Association

The American Family Association ("AFA") is arguably the largest, best organized and most vocal moral activist group. It is based in Tupelo, Mississippi and is led by Reverend Donald Wildmon. Wildmon founded the AFA in 1977 to foster "the biblical ethic of decency in American society with a primary emphasis on television."¹⁰⁴ The organization sponsors economic boycotts, involves itself in political lobbying and encourages its members and followers to write letters to corporations, the media and politicians. In 1989, Wildmon boasted that the AFA had received over \$5.2 million in donations.¹⁰⁵

Reverend Wildmon first gained publicity when he organized "Turn Off TV Week" from February 27 through March 5, 1977. Wildmon knew that the accurate identification of programs containing the highest levels of sex, violence and profanity and the companies that sponsor them was a major undertaking.¹⁰⁶ Therefore, he enlisted the aid of the National Federation for Decency, the National Citizens Committee for Better Broadcasting and the National PTA to give him ammunition in his fight against the television networks. Additionally, he monitored all network programming every night for fifteen weeks in 1977¹⁰⁷ to find instances of suggested sexual intercourse and otherwise sexually suggestive content.¹⁰⁸

This television monitoring led Reverend Wildmon to the conclusion that Sears, Roebuck & Company was one of the major sponsors of con-

103. In the music industry, the threat of economic boycotts has also had an effect:

"Fearing consumer boycotts many record-store owners removed questionable product from their shelves in 1990 and discontinued selling records with warning labels to anyone younger than 18 [and] Wal-Mart, the 1,531-store Arkansas-based retail chain . . . introduced its own 'banned and restricted' list of audio and video products in 1990." Chuck Philips, *A War On Many Fronts; Censorship: 1990 Was the Year that "Free Expression" Ran Head-On into "Moral Concern." But the Conflict May Only Be Beginning*, L.A. TIMES, Dec. 26, 1990, at F1.

104. DEBORAH M. BUREK & KARIN E. KOCK, *ENCYCLOPEDIA OF ASSOCIATIONS* 1581 (24th ed., 1990). See also *Wojnarowicz v. Family Ass'n*, 745 F. Supp. 130, 133 (S.D.N.Y. 1990).

105. Bruce Selcraig, *Reverend Wildmon's War on the Arts*, N.Y. TIMES, Sept. 2, 1990 (Magazine), at 22.

106. WILDMON, *supra* note 77, at 43.

107. *Id.* at 44-45.

108. *Id.* at 44.

troversial and offensive programs. Believing that a boycott would make advertisers wary of being held accountable for the content of programs they sponsor,¹⁰⁹ Wildmon announced on March 3, 1978 that his organization would sponsor a nationwide consumer boycott of Sears stores.¹¹⁰ In this way, the advertiser boycott was born.

Wildmon also organized groups to picket Sears retail outlets nationwide.¹¹¹ This, together with the announced boycott, caused Sears to cancel over one hundred of its scheduled commercials in television programs airing during the 1977-78 season.¹¹² These concessions did not satisfy Wildmon, however, who demanded that Sears also abandon its advertising of other programs. On May 12, 1978, Wildmon himself paced back and forth with a picket sign, yelling "Boycott Sears" at the Sears corporate headquarters in Chicago.¹¹³ Shortly thereafter, Sears announced that it had withdrawn its advertisements from two additional television programs, *Charlie's Angels* and *Three's Company*.

In the early 1980's, Wildmon changed his tactics. He decided to speak directly with executives of Proctor & Gamble, one of the largest television advertisers at the time. Perhaps to his surprise, Proctor & Gamble was swayed by his appeal and decided "to bring their heavy weight to bear on the networks rather than face a threatened boycott."¹¹⁴ In June 1981, Wildmon was able to convince Proctor & Gamble's Chairman, Owen B. Butler, to withdraw commercials from fifty programs. This gave Wildmon even more credibility in his fight against offensive programming.¹¹⁵

Encouraged by his success, Wildmon set out to create a widespread, national moral activist organization. Perhaps the most notorious boycott by this organization was its action against CBS, Ralston-Purina and Mars, Inc. in connection with the children's animated program *Mighty Mouse*. In 1988, Wildmon watched an episode of the cartoon that had been sent to him by a woman who had recorded it for her children.¹¹⁶ When the cartoon mouse pulled out a substance (which CBS claimed was a combination of crushed flowers and tomatoes that the cartoon character had been selling during the cartoon episode) from his wardrobe and sniffed it, Wildmon was outraged. He later described his reaction:

109. *Id.* at 46.

110. *Id.*

111. WILDMON, *supra* note 77.

112. *Id.* at 49-55.

113. *Id.*

114. *Bring on the Boycotts*, *supra* note 91.

115. See Selcraig, *supra* note 105.

116. WILDMON, *supra* note 77, at 179.

"Please tell me I didn't actually see what I think I just saw. Let's see that again. It's plain as day. They've really got Mighty Mouse snorting cocaine."¹¹⁷

Wildmon responded by contacting the press, CBS, the program's sponsors and even Congress. He mailed press releases to newspapers all over the United States¹¹⁸ and held a screening of the program in Washington, D.C., to which he invited all members of Congress.¹¹⁹ This led to much press coverage of the controversy. CBS was forced to make a statement "categorically den[ying] that Mighty Mouse or any other character was shown sniffing cocaine."¹²⁰ As a result of the publicity and public pressure, two of the program's sponsors, Ralston-Purina and Mars, Inc., made statements condemning CBS and the Mighty Mouse episode and asked the network to issue an apology.¹²¹

Wildmon has also launched an economic sanctions campaign against the Holiday Inn hotel chain. For several years, Holiday Inn provided cable programming in its rooms. On some of the cable television channels, R-rated and adult movies were shown, including films with titles like *Group Marriage*, *Chatterbox* and *Forever Emmanuelle*.¹²² Wildmon and his followers boycotted the chain. Holiday Inn denied that the boycott had any adverse effects, asserting that some of the picketed hotels actually experienced increased occupancy rates. Nonetheless, over fifty of the chain's hotels stopped providing its guests with adult movies.¹²³

In 1989, CLear-TV (which stands for Christian Leaders for Responsible Television), a splinter group of the AFA formed by Reverend

117. *Id.* at 180.

118. *Id.* at 182.

119. *Id.* at 185-87.

120. *Id.* at 182-83.

121. Wildmon has also taken his complaints regarding television program content directly to the Federal Communications Commission in the form of formal complaints. In August 1990, Wildmon filed a formal complaint with the FCC after WGBH-TV, a television station in Boston, broadcast pictures of the late photographer Robert Mapplethorpe's controversial photographic exhibit in Boston. The station broadcast scenes from the exhibit on its 10:00 p.m. news program with a disclaimer warning viewers that the broadcast might offend some viewers. The station said its intention was to broadcast the exhibit so that its viewers could decide for themselves whether it was offensive. Nevertheless, Wildmon provided the FCC with a videotape recording that allowed the commission to review the complaint. See *FCC Gets Copy of WGBH-TV Mapplethorpe Broadcast*, BROADCASTING, Aug. 20, 1990, at 59; *Wildmon Irked by WGBH*, ELECTRONIC MEDIA, Aug. 20, 1990, at 1; Yohu Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 326, 346 n.101 (1989).

122. Selcraig, *supra* note 105.

123. *Id.*

Wildmon, launched a boycott of two major television sponsors whom they considered repeat offenders for sponsoring a number of shows that violated CLear-TV's program standards.¹²⁴ The group announced a one-year boycott of Mennen Company and Clorox Corporation to protest their sponsorship of five programs during the 1989 television season. These programs were *Miami Vice*, *A Man Called Hawk*, *Dream Street*, *Midnight Caller* and *Tour of Duty*.¹²⁵ The boycotters found these programs offensive because they contained "excessive violence, sex, profanity and 'anti-Christian stereotyping.'" ¹²⁶

Reverend Wildmon considered the boycott of Clorox Corporation a success. The National Association of Evangelists, an organization to which Wildmon also belonged, claimed that approximately sixty million members from Wildmon's group and other organizations throughout the country backed the Mennen and Clorox boycott.¹²⁷ However, Clorox officials stated that the boycott had had no effect on the company and that its corporate profits had actually risen steadily over the previous year.¹²⁸

Two days before Thanksgiving in 1990, Reverend Wildmon and his CLear-TV organization initiated another campaign. This time, they targeted Burger King Corporation for advertising during a CBS made-for-television movie. The movie, *The Stranger Within*, portrayed a homicidal maniac's murder of his mother, her boyfriend, the family dog and a policeman. CLear-TV launched a two-month boycott against Burger King. Burger King ended the boycott by apologizing to Wildmon and agreeing not to support any offensive programs. In November, as a negotiated compromise to end the boycott, Burger King issued an Open Letter to the American people, affirming its support for the family unit and traditional family values on television.¹²⁹ Burger King's advertisement appeared in such newspapers as the *Los Angeles Times*, the *Miami Her-*

124. *Boycott Hits TV Sponsors*, ELECTRONIC MEDIA, July 24, 1989, at 3.

125. *Id.*

126. *Id.*

127. Gay, *supra* note 90. The National Association of Evangelicals was founded in 1942 to act as a tool for inter-church cooperation. It currently boasts a staff of 180 and four million members. BUREK & KOCK, *supra* note 104. Mennen and Clorox both claimed that the boycott announced by CLear-TV had no effect on the companies' sales. This may have hurt the effectiveness of Wildmon's boycotts because, two years later, when Wildmon announced a boycott of S.C. Johnson, the company manufacturing Johnson Wax, S.C. Johnson did not give in to any of Wildmon's demands, claiming that his boycotts of Mennen and Clorox did not affect their sales. See *S.C. Johnson—Boycotts Didn't Hurt, No Changes*, AFA J. May 1991, at 1.

128. See Wildmon, *Clorox Disputes Boycott's Success*, ELECTRONIC MEDIA, March 26, 1990, at 16.

129. *Have It Your Way*, NEW REPUBLIC, Dec. 24, 1990, at 7.

ald and the *New York Times*, as well as several hundred other newspapers.¹³⁰

Wildmon has been especially outraged by television programs portraying homosexual characters. He has launched campaigns against the NBC series *Love, Sidney* and ABC's *Heartbeat*.¹³¹ As a result of his pressures, in December 1990 ABC lost more than \$500,000 due to advertisers' defections from the television program '*thirtysomething*' because of an episode that included two gay characters.¹³² In previous instances, when these sporadically recurring characters had appeared on the program, ABC lost more than a million dollars in advertising revenues.¹³³

On February 7, 1991, NBC broadcast an episode of the program *L.A. Law* in which two women exchanged a "lingering kiss" in a parking lot and, later in the episode, one of the women described herself as being sexually attracted to men but also as being "flexible."¹³⁴ Wildmon responded by announcing that he planned to contact the show's advertisers and organize a letter-writing campaign.¹³⁵ As a result, NBC announced that it did not intend to develop a gay or lesbian character and stated that the lesbian kiss was an attempt to add texture to the character.¹³⁶ This upset homosexual activists who alleged that NBC had reversed its earlier decision to develop a bisexual-lesbian character beyond the episode.¹³⁷

NBC admitted that five advertisers, apparently fearing backlash, had withdrawn their commercials from the *L.A. Law* episode before it aired. These advertisers had great foresight because Wildmon had already compiled a list of the show's advertisers that included Subaru, Chrysler's Jeep-Eagle division, American Express, Pillsbury, Miller Beer, Anheuser-Busch, Mitsubishi and L'Oreal.¹³⁸

Only a few weeks after the *L.A. Law* incident, Wildmon began a new action to protest a docudrama scheduled to be broadcast on CBS. The program, *Absolute Strangers*, was based on the true story of a husband who was forced to fight a legal battle to permit doctors to perform an

130. See Anthony Ramirez, *Burger King Ads Help End Boycott by Religious Group*, N.Y. TIMES, Nov. 7, 1990, at D1.

131. Dottie Enrico, *TV Politics and Strange Bedfellows*, NEWSDAY, Mar. 4, 1991, at 29.

132. Steve Weinstein, *When Gay Means Loss of Revenue*, L.A. TIMES, Dec. 22, 1990, at F1.

133. *Id.*

134. Dottie Enrico, *"Lesbian Kiss" on L.A. Law Criticized*, TORONTO STAR, Mar. 5, 1991, at F6.

135. See *id.*

136. *Id.*

137. *Id.*

138. Enrico, *supra* note 131, at 29.

abortion on his comatose wife. His wife had fallen into a coma following an automobile accident in 1989. Joining with other anti-abortion organizations, Wildmon stated: "We will contact the advertisers and alert them to this particular program. Most advertisers I know wouldn't want to be involved in any kind of program, pro or con, about abortion."¹³⁹ Regarding CBS' decision to air the movie, Wildmon continued: "Hey, they want to lose money? They can go ahead . . . We'll help them lose a little and ask them to forgive [us] all the time when we're doing it."¹⁴⁰

In June 1991, Wildmon waged another battle, this time against a television documentary funded by grants from the National Endowment for the Arts ("NEA") and scheduled to be broadcast on public television stations nationwide. The documentary, *Tongues Untied*, concerning homosexual black males and their self-identity, was part of a series produced for public television. Wildmon called *Tongues Untied* offensive and urged the public to watch the program in order to see "how NEA film money is spent."¹⁴¹ In response to the controversy surrounding the program, 174 public television stations refused to air it on June 17.¹⁴²

In September 1991, Wildmon joined special interest groups and The National Federation of the Blind in attacking a television show, titled *Good & Evil*, which contained a scene humorously depicting a blind character. The protesters called the show "insulting" to blind people, and Reverend Wildmon urged sponsors to boycott the program.¹⁴³

Wildmon's assault on television has not been limited to specific instances of television programming.¹⁴⁴ He has tried to alter Federal Communication Commission ("FCC") policy by attempting to control the President's choice of FCC commissioners. In 1986, Wildmon and his followers engaged in a letter-writing campaign to Senators and the Senate

139. *Redrawing Real-Life Battle Lines*, BERGEN REC. (Bergen County, N.J.), Mar. 17, 1991, at E1. See also Dennis McDougal, *Battle Lines Form over "Strangers,"* L.A. TIMES, Mar. 13, 1991, at F1.

140. *Redrawing Real-Life Battle Lines*, *supra* note 139.

141. "P.O.V." *Walks PBS Tightrope*, ELECTRONIC MEDIA, Sept. 9, 1991, at 4, 41.

142. *Id.* Public television stations also refused to air another documentary in the series, *Stop the Church*. PBS decided that the documentary was "inappropriate for distribution because its pervasive tone of ridicule overwhelms its critique of policy." Doug Halonen, *PBS Axes "P.O.V." Report on Protest Against Church*, ELECTRONIC MEDIA, Aug. 19, 1991, at 8. The documentary was about a protest held by AIDS activists at St. Patrick's Cathedral in New York City in 1989. See also Walter Goodman, *Prime Time vs. The Art of Ridicule*, N.Y. TIMES, Sept. 1, 1991, at H21.

143. William Mahoney, *ABC Backs "Good & Evil,"* ELECTRONIC MEDIA, Sept. 16, 1991, at 2.

144. Wildmon's favorite television programs are reportedly *The Andy Griffith Show* and *The Cosby Show*. Y. Cox, *Rev. Donald Wildmon; Mississippi Minister Takes on TV Networks*, USA TODAY, July 17, 1989, at 6B.

Committee on Commerce, Science and Transportation to oppose the re-nomination of FCC commissioner Mark Fowler.¹⁴⁵ Wildmon believed that Fowler had done "nothing, zero, zilch" about indecency.¹⁴⁶ Later that year, Wildmon cooperated with the FCC, just as Comstock had cooperated with New York law enforcement agencies and the Post Office Department a century earlier. The FCC, unable to initiate a proceeding against a television station, reportedly asked Wildmon to file a complaint against a broadcast of the film *The Rose* on Memphis television station WPTY.¹⁴⁷

During the summer of 1989, when President Bush planned to nominate three commissioners to the FCC, Wildmon sent him a harshly-worded letter suggesting that President Bush nominate a conservative Christian commissioner. Wildmon wrote to the President that he intended to tell all of his followers about Bush's opposition to the views of the evangelical community. Wildmon reportedly ended his letter to the President by stating: "We may not be able to do anything at this time but suck hind tit, but we can change sows."¹⁴⁸ During the Senate Commerce Committee confirmation hearings of President Bush's three nominees for FCC commissioners in 1989, Reverend Wildmon testified as a witness.¹⁴⁹

2. Individuals

Wildmon and his organizations are not the only groups calling for boycotts of television sponsors. In 1989, a housewife, Terry Rakolta, called for a boycott of her own. Rakolta wrote twenty letters to the corporations that advertised during the broadcast of *Married . . . With Children*, calling the program "soft pornography."¹⁵⁰ She wrote to the corporate sponsors' chief executives, corporate directors, marketing directors and advertising agents for several weeks until the president of Coca-Cola sent her a personal apology stating that he was "corporately, professionally, and personally embarrassed" by the situation.¹⁵¹ Rakolta also convinced two of the program's sponsors, Tambrands Inc. and Dorsey Laboratories, to withdraw commercial sponsorship of the show. Several other sponsors, such as Mitsubishi, American Home Food, and Kimberly Clark Corporation, also stopped advertising during the pro-

145. See Crigler & Byrnes, *supra* note 121.

146. *Id.*

147. *Id.* at 346.

148. *Religious Right up in Arms over FCC Nominees*, BROADCASTING, July 31, 1989, at 48.

149. *Id.*

150. Paula Span, *The Mother Who Took on Trash TV*, WASH. POST, Oct. 10, 1990, at C1.

151. *Id.*

gram but claimed that their withdrawal was not a result of Rakolta's actions.

Rakolta's purpose for announcing her boycott was to return family programming to television. She called on the television industry to broadcast unoffensive programming that would be harmless to children watching television. Asserting that the "networks have become the [number] 1 babysitter for children,"¹⁵² Rakolta insisted they must bear the responsibility of creating programming appropriate for children. Rakolta became an instant celebrity. She was invited to debate many television industry executives. Responding to their suggestions that viewers have the responsibility and ability to control what they watch, Rakolta countered that she "didn't buy a television set to turn it off."¹⁵³

Marilyn Loeffel, a thirty-seven-year-old mother of two girls, is another housewife who has organized moral activists. In 1980, Mrs. Loeffel, who lives in Memphis, Tennessee, established a group of approximately three hundred families called FLARE, which stands for Family Life America Responsible Education Under God, Inc. The organization was formed to "fight moral pollution and [to] protect the family."¹⁵⁴ The organization engages in local and statewide political lobbying and sponsors lectures and an annual "Christian fair."¹⁵⁵ In May 1990, under Loeffel's leadership, FLARE was able to pressure the State of Tennessee to amend its obscenity law. It also persuaded the city of Memphis to pass an ordinance that "prohibits dancers at topless bars from getting any closer than 12 inches to customers."¹⁵⁶

Loeffel's organization sparked much local debate when, in April 1990, it influenced the Memphis City Council to pass a law prohibiting "any performer, promoter or venue owner [from] knowingly expos[ing] a minor to 'harmful material' during a concert in Memphis."¹⁵⁷ FLARE believed that the law was necessary to protect community children from bad and immoral influences. Under the ordinance, a concert is banned if it "predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

152. Brian Lowry, *Media Maid Terry Rakolta a Hit on the Crix Tour; Faced Harsh Questioning*, VARIETY, July 26-Aug. 1, 1989, at 40.

153. *Id.*

154. Chuck Philips, *The Battle of Memphis; It's Parent Against Parent in the Debate over a City Law That Sets Strict Limits on What Kids Are Allowed to See at Pop Concerts*, L.A. TIMES, Oct. 7, 1990, (Calendar), at 9.

155. *Id.*

156. *Id.*

157. *Id.*

is utterly without redeeming social importance for minors."¹⁵⁸ Each concert performed within the city must be patrolled by at least two police officers. Additionally, police officers meet with concert promoters and performers before each concert to explain the boundaries of the law.¹⁵⁹

B. Boycotts of Motion Pictures

Reverend Wildmon and his associates do not limit their efforts to television industry targets. In 1988, they declared war on the motion picture *The Last Temptation of Christ*,¹⁶⁰ calling for a one-year boycott of any theater that showed the film.¹⁶¹ Wildmon also suggested a boycott of all of the films, television programs, books and toys distributed by *The Last Temptation of Christ's* distributor, Paramount Pictures, and its parent company MCA. Wildmon even advocated voting against the Democratic party because it had received funds from MCA's principals.¹⁶² When the pay-cable channel Cinemax aired *The Last Temptation of Christ*, Wildmon and three hundred of his followers vowed to cancel their cable television services for a period of three months, costing the local cable company twenty-five dollars a month for each subscriber.¹⁶³ Apparently, Wildmon's pressures had some impact upon the distribution of *The Last Temptation of Christ*. At least one videocassette rental chain, Blockbuster Video, the nation's largest, refused to carry the videocassette of the film.¹⁶⁴

However, Blockbuster Video did carry videocassettes of other films that Wildmon found offensive. Consequently, it soon found itself on the receiving end of another boycott. This time, Wildmon and his supporters objected to all of the films the Motion Picture Association of America ("MPAA") had self-rated with the NC-17 rating (not recommended for viewers under the age of seventeen),¹⁶⁵ usually because of sexual themes,

158. *Id.*

159. Philips, *supra* note 154. The ordinance gained support in the city council after Tommy Lee, the drummer for the heavy-metal band Motley Crue, "mooned" the audience at a Memphis concert. *Id.*

160. See *Clergy Nail Christ & Universal*, VARIETY, Aug. 10, 1988, at 1.

161. Crigler & Byrnes, *supra* note 121, 344 n.88.

162. *Id.*

163. See David Broaben, *3-Month Boycott Of Pay TV Protests "Last Temptation,"* WASH. TIMES, Oct. 6, 1989, at A4.

164. See Marc Berman, *Wildmon & Co. Seek to Block NC-17 Pix at Blockbuster Chain*, VARIETY, Jan. 14, 1991, at 25. Blockbuster reportedly had net earnings in 1990 of \$68.7 million out of gross revenues of \$1.2 billion, making it the largest video rental chain in the country. *Blockbuster Net Earnings Soar*, VARIETY, Jan. 28, 1991, at 90.

165. The Motion Picture Association of America (MPAA) has installed a self-imposed rating system. It views its members' films, or any films submitted to it, and provides a rating based upon the film's content. See generally Friedman, *The Motion Picture Rating System of*

nudity or violence. Wildmon claimed that the NC-17 rating represented an effort by Hollywood to mainstream pornographic films.¹⁶⁶ The AFA sent to each of its supporters pre-printed postcards stating, "I'm going to take my business to another videostore until you stop carrying NC-17"¹⁶⁷ with instructions to send the postcards to the chairman of Blockbuster, Wayne Huizenga.¹⁶⁸ Wildmon also proposed to distribute approximately one million "Fight NC-17 Action Packets" to his supporters at an estimated cost of \$350,000.¹⁶⁹

Intimidated by Wildmon's threats and in receipt of several thousand postcards, Blockbuster yielded to Wildmon's demands.¹⁷⁰ Blockbuster's announcement of compliance came less than a week after Wildmon announced his boycott. Blockbuster tried to save face, however, by denying that its sudden decision had resulted from the boycott.¹⁷¹ Wildmon ended the boycott of the company but promised to continue pressuring exhibitors not to show NC-17-rated films. He threatened to ask his supporters to petition their local movie theaters and to pressure local newspapers to refuse advertising for any NC-17-rated movies.¹⁷²

Whether or not Blockbuster's decision not to carry NC-17 movies directly resulted from Wildmon's boycott, Wildmon's pressures on Blockbuster had a chilling effect on other videocassette retailers. Only two weeks after the Blockbuster boycott, the Regional Leaders Conference of the Video Software Dealers Association held a meeting in La Jolla, California, where the nation's video retailers expressed their concern over the NC-17 rating.¹⁷³ The video retailers openly confessed their fears that carrying NC-17 movies would make them vulnerable to opposition from moral activists.¹⁷⁴

The battle between the Video Software Dealers Association and the AFA continues today. In some regions, the AFA has prevailed, causing

1968: *A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973). Some states require ratings on all videotapes rented or sold to the public. See also FLA. STAT. ANN. § 847.202 (1990).

166. Marc Berman, *NC-17 X'd out at Blockbuster; Wildmon, AFA Boycott Lifted*, VARIETY, Jan. 21, 1991, at 27.

167. Berman, *supra* note 164.

168. *Id.*

169. *Id.*

170. See Berman, *supra* note 166.

171. *Id.*

172. *Id.*

173. *Vid Retailers Rate NC-17 at VSDA Confab*, VARIETY, Jan. 28, 1991, at 29.

174. *Id.*

video retailers to remove the NC-17 films from their shelves.¹⁷⁵ The political pressure forced retailers to engage in lobbying and public relations efforts to enhance their image, such as sponsoring blood drives.¹⁷⁶

In the 1990's, Wildmon's efforts to censor motion pictures continued on other fronts. In February 1991, the AFA published a letter, signed by Wildmon and eight hundred other religious leaders, alleging anti-Christian bigotry in Hollywood and threatening to launch widespread boycotts against major movie studios and television networks.¹⁷⁷ The letter was sent to the management of the studios and networks.¹⁷⁸ Among other things, Wildmon complained that the movie *Ghost* misleads viewers into believing that there is a form of salvation other than Jesus Christ.¹⁷⁹

In another instance, Wildmon spoke out against a motion picture entitled *Poison* because it dealt with homosexual themes. Wildmon asserted that since the film was partly funded by a grant from the NEA, the government had paid to have homosexuals engage in unnatural sexual acts on film. When asked whether he took the content of such movies too seriously, Wildmon replied that he possesses a sense of humor but that "[r]arely on programs or movies cast in a modern-day setting are Christians shown in a neutral, much less positive, manner."¹⁸⁰

C. Actions Against the Visual Arts

Wildmon's economic boycotts and letter-writing campaigns are also directed against public funding of the arts. Wildmon believes that it is the

responsibility of the Christian to be involved in the political process Too often we have divorced Christian commitment from social, political responsibility. Separation of church and state does not mean separation of Christian faith and civic responsibility.¹⁸¹

To express his Christian commitment, Wildmon attempted to stop the government from funding offensive, pornographic or anti-Christian

175. Earl Paige, *Florida Retailer Spreads the Word on Censorship*, BILLBOARD, Mar. 16, 1991, at 42.

176. *Id.*

177. Beth Kleid, *Morning Report: Movies*, L.A. TIMES, Mar. 4, 1991, at F2.

178. David J. Fox, *Religious Leaders Decry Movies, TV: Entertainment: A "Statement of Concern" Sent to Studios and Networks Cites Increasing Incidences of "Anti-Christian Bigotry,"* L.A. TIMES, Feb. 28, 1991, at F3.

179. *Id.*

180. *Id.*

181. DONALD E. WILDMON, STAND UP TO LIFE 88-89 (1976).

art. Through the AFA, he urged his followers to write letters to Congress. The *AFA Journal* periodically reports on government funding of art works and exhibits that Wildmon finds offensive or anti-Christian. Occasionally, the *AFA Journal* publishes the addresses and telephone numbers of the United States Senate and House of Representatives to help its readers protest to their Congresspersons.

Wildmon often encourages his followers to take action against government funding of certain art works. One letter to his followers became the subject of a copyright action by a New York artist, David Wojnarowicz. In his letter, Wildmon had reprinted some images from Wojnarowicz' art work.¹⁸² Wojnarowicz was granted an injunction and awarded nominal damages for Wildmon's unauthorized use of his art work.¹⁸³

During the summer of 1990, several conservative Congressmen led by Jesse Helms of North Carolina, initiated a movement to abolish the NEA. Wildmon supported their campaign.¹⁸⁴ He sent a letter with examples of offensive art work to every member of Congress. Wildmon also wrote to his followers, urging: "Don't let Congress give your hard-earned tax dollars to people who will produce hate-filled, bigoted, anti-Christian and obscene art."¹⁸⁵ Although the campaign failed to eradicate the NEA, it succeeded in imposing restrictions on the granting of NEA funds based on obscene content.

Subsequently, Congress approved "scrapping current restrictions on the kinds of art eligible for federal support."¹⁸⁶ However, the NEA reserved the right to cut off grants to artists who subsequently violated obscenity or pornography laws. Wildmon's campaign contributed to the controversy surrounding the NEA and influenced the agency's conduct.¹⁸⁷ In fact, John E. Frohnmayer, the chairman of the NEA, alleg-

182. Will Nixon, *On the Knife-Edge with Wojnarowicz and Vintage*, PUB. WKLY., Feb. 1, 1991, at 48.

183. *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990). The decision was grounded upon both the Copyright Act and the New York Artists' Authorship Rights Act. See N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney).

184. David Zimmerman, *No Truces in the Struggle over Art and Obscenity*, USA TODAY, Jan. 8, 1991, at 6D.

185. Selcraig, *supra* note 105.

186. See *Congress Junks NEA Bill, Okays Docking Artists*, VARIETY, Oct. 29, 1990, at 59.

187. *Id.* The AFA has also engaged in widespread lobbying and other political efforts. For example, in 1988, the AFA submitted a twenty-page statement to the Senate Committee on the Judiciary during the Commission's hearings, which were held to consider support of two Senate bills, S.703 and S.2033. These proposed bills made illegal and provided criminal and civil penalties for the creation, distribution and exploitation of child pornography, and also made illegal the act of inducing any child to engage in child pornography. The bills also permitted seizure of property in obscenity convictions, imposed record-keeping requirements on produ-

edly rejected several applications for NEA grants in May and June 1990 in the wake of the NEA controversy.¹⁸⁸ Recently, Wildmon stated that the war against offensive art will continue: "Are we over the hump? No. It's just getting started."¹⁸⁹

C. *Boycotts of the Publishing Industry*

1. The American Family Association

In 1986, Wildmon testified before the Attorney General's Commission on Pornography ("Commission"), making sweeping allegations that twenty-six companies were involved in the sale or distribution of printed pornography.¹⁹⁰ In order to verify Wildmon's accusations, Alan Sears, the Executive Director of the Commission on Pornography, sent letters to the twenty-six companies that Wildmon had implicated.

The language of the letter, dictated on Justice Department stationery by some members of the Commission, was heavy-handed and some companies allegedly saw it as threatening: "The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final section on identified distributors." The letter enclosed the Wildmon testimony, but did not identify its source. It asked firms to "advise the Commission if you disagree. Failure to respond will necessarily be accepted as an indication of no objection."¹⁹¹

Perceiving this letter as a threat of legal action by the government, twelve thousand retail stores stopped selling *Playboy*, one of the implicated publications. *Playboy* and other publishers obtained a federal court

cers of sexually explicit material, and prohibited the distribution of obscene material by computer or on cable or pay television. See *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing on S.703 and S.2033 Before the Committee on the Judiciary of the Senate*, 100th Cong., 2d Sess. (1988).

The Statement submitted by the AFA through its General Counsel, Peggy M. Coleman, addressed bill S.2033 and argued that the bill was constitutional and that Congress should act swiftly to pass the bill. The AFA concluded that the bill would "fill the gaps that currently exist and will demonstrate the commitment of the federal government to eradicating the free flow of obscene material and child pornography." *Id.* at 393-412.

188. See William Honan, *U.S. Documents Said to Show Endowment Bowed to Pressure*, N.Y. TIMES, Sept. 18, 1991, at C13.

189. Zimmerman, *supra* note 184.

190. The Commission was formed by Attorney General Edwin Meese III on May 20, 1985 to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." See FINAL REPORT, *supra* note 8, at li-iii.

191. *Id.* at xxxii.

ruling that instructed the Commission to send a letter retracting the implied threat and prohibiting the Commission from publishing Wildmon's list.¹⁹² In 1986, however, as a result of the letter sent by the Commission, one major chain of retail convenience stores stopped selling adult magazines.¹⁹³

Wildmon continued his war against *Playboy*. In September 1991, the *AFA Journal* began a monthly report identifying advertisers in *Playboy's* and *Penthouse* magazines in order to encourage letter-writing and boycotts. Targeting Chrysler, one of *Playboy's* advertisers, the AFA initiated a boycott and a letter-writing campaign against the company. AFA asserted that Chrysler received between fifty thousand and sixty thousand letters.¹⁹⁴ Chrysler denied this, stating that it received only a few hundred letters and was not aware of any boycott.¹⁹⁵ In January 1991, however, Chrysler announced that it would no longer advertise in *Playboy*: in February, Chrysler placed only one advertisement in the magazine.¹⁹⁶

AFA chapters continue to petition and boycott local convenience stores that sell magazines such as *Playboy*, *Penthouse* and *Hustler*. In 1991, the AFA Michigan chapter also boycotted the Hills Department Store chain because it sold *Playboy*-brand clothing. Similarly, AFA chapters in Nebraska and South Dakota engaged in a letter-writing campaign to urge Common Cents convenience stores to stop selling offensive magazines.

In 1991, Wildmon announced a boycott of Waldenbooks, a large retail bookstore chain owned by K-Mart. Wildmon declared the stores to be distributors of pornography because they sold *Penthouse* and *Playboy*, as well as sexually explicit paperbacks.¹⁹⁷ As a result, Waldenbooks stopped carrying the *Blue Moon* series of paperback books. Wildmon continued to complain, however, that Waldenbooks sold other paperback books that he considered pornographic, such as the *Red Stripe* series.¹⁹⁸

On October 31, 1989, a coalition of booksellers, magazine publishers and distributors filed a lawsuit in Florida against Wildmon, the AFA,

192. *Id.* at xxxiii.

193. *Id.*

194. Paul Farhig, *Chrysler to Halt Ads in Playboy: Auto Firm Acts After Getting Complaints*, WASH. POST, Feb. 22, 1991, at C1.

195. *Id.*

196. Arlena Sawyers, *Group Launches Boycott of Chrysler, Cites Playboy Ads*, AUTOMOTIVE NEWS, Jan. 14, 1991, at 3.

197. Zimmerman, *supra* note 184.

198. *Boycott of K-Mart, Waldenbooks Continues to Grow*, AFA J., Apr. 1991, at 1.

and the AFA's director, David Caton.¹⁹⁹ The plaintiffs claimed that Wildmon and his associate Caton had committed extortion and corrupt acts by threatening Florida retailers with boycotts for selling *Playboy* and *Penthouse* magazines. Specifically, the complaint cited a series of letters mailed by Caton to Florida booksellers and distributors, accusing them of selling illegal, sexually explicit materials and threatening boycotts and disruption if they continued to sell the magazines.²⁰⁰

The plaintiffs charged that the Florida AFA's efforts to suppress sales of magazines through such activities as picketing, letter-writing, and threats of criminal prosecution and negative publicity constituted extortion under both federal and state Racketeer Influenced and Corrupt Organization ("RICO") laws.²⁰¹ They contended that the lawsuit was necessary to prevent an intimidating and extortionate effort to stop the publication of materials protected by the First Amendment.²⁰²

The suit was filed one day before a planned press conference by Florida's AFA, at which the group intended to name various distributors of "illegal magazines." After the filing of the lawsuit, the AFA postponed the press conference. Apparently, the lawsuit also affected the picketing of four hundred Waldenbooks and K-Mart stores scheduled for April 27, 1990: only about one hundred picketers showed up at two stores, one in Florida and the other in Arkansas.²⁰³ A year after the suit was filed, the parties reached an out-of-court settlement in which the AFA reportedly agreed to cease making threats and using illegal means to disrupt the distribution of material protected by the First Amendment.²⁰⁴

2. Other Organizations

The National Organization for Women ("NOW"), a large organization with franchises nationwide, also occasionally engages in boycott activities. Recently, the organization vowed to launch a boycott against

199. *ABA/Periodical Coalition Ends Suit Against Christian Activists*, PUB. WKLY., Nov. 30, 1990, at 13.

200. *Id.*

201. *Playboy, Others Take Offensive Against Product Boycotters; It and Other Publishing Groups File Suit Against Florida Affiliate of Rev. Donald Wildmon's American Family Assoc., Charging It with Extortion*, BROADCASTING, Nov. 6, 1989, at 83. The plaintiffs were criticized in the press for using RICO laws to stifle the AFA's First Amendment right to picket and to express their opinions about the plaintiffs' magazines. See, e.g., Nat Henhoff, *RICO: Hazardous to Users and Targets*, WASH. POST, Dec. 9, 1989, at A19; *RICO v. RICO*, WALL ST. J., Dec. 14, 1989, at 22.

202. Reuter, *supra* note 76.

203. *Id.*

204. *ABA/Periodical Coalition Ends Suit Against Christian Activists*, *supra* note 199.

booksellers "intending to sell Bret Ellis' violent new novel *American Psycho*, about a misogynist serial killer."²⁰⁵ Ellis' book was the subject of much publicity when Simon & Schuster, its original publisher, breached its agreement with Ellis. Simon & Schuster's president, Dick Snyder, made the ultimate decision not to publish the book, reportedly under pressure from the publishing company's parent corporation, Paramount Communications, Inc. Snyder stated that he had not been aware of the content of the book and, had he been aware of it, he would not have agreed to publish it in the first place. After Simon & Schuster withdrew from publication, Vintage Books published the novel.

III. CONCLUSION

In July 1989, Marshall Herskovitz, then executive producer of the television program '*thirtysomething*,' complained that advertiser boycotts and public pressures on advertisers have become part of the equilibrium that will guide the television medium in the future.²⁰⁶ According to Herskovitz, this arrangement encourages advertisers to regulate the content of television programs and creates "a morass from which there is no escape."²⁰⁷

Reverend Billy A. Melvin, the chairman of Wildmon's CLear-TV organization, has stated that the group will continue to

boycott companies that persist in sponsoring shows with high incidents of sex, violence or profanity. Happily, a growing number of corporations are recognizing the legitimacy of our concern and are taking steps to pre-screen and be selective in the placement of their advertising. We expect to continue our efforts in [the future] and will give the American people an opportunity to express their feelings through future boycotts.²⁰⁸

Wildmon and other activists believe that the growth of cable and pay television threatens to turn homes into pornographic theaters. Therefore, in the future, they are likely to engage in more boycott activities aimed at new technologies and media, as well as continue their activities aimed at broadcast television. The film industry will likely be the most heavily targeted by moral activists because they consider Hollywood to be the "leader in the child prostitution epidemic that plagues our nation."²⁰⁹ Consequently, their battle against the motion

205. Philips, *supra* note 103.

206. Lowry, *supra* note 152.

207. *Id.*

208. Philips, *supra* note 103.

209. Wildmon, *supra* note 78, at 102.

picture industry is likely to continue whole-heartedly in the future.²¹⁰ The new twist might be to boycott those who exploit derivative rights arising from the films and even newspapers that accept advertising for the films. In August 1991, for example, many print outlets refused to carry advertisements for the motion picture, *The Pope Must Die*, because of fear of public backlash. They feared that moral activists might take offense to the name of the film and the art work that depicted the Pope.²¹¹ This may be a forerunner of future boycotts, caused not only by the controversial content of motion pictures, but also by controversial titles and art work.

Additionally, the AFA has successfully halted the production of toy dolls based on the movie character "Freddy Krueger," from the horror film series *A Nightmare On Elm Street*.²¹² Matchbox Toys and New Line Cinema had originally entered into an agreement to manufacture talking Freddy Krueger dolls. However, when Reverend Wildmon announced a boycott of the doll and any toy store that planned to sell it, calling the toy "a product of a sick mind," Matchbox Toys announced that it would not market the doll, although it had already shipped forty thousand of them and had orders for another one hundred sixty thousand.²¹³

Similarly, it appears that the war against the visual arts will continue in the future. In fact, this may be the most active front for the moral activists. The AFA has expressly declared that it intends to intensify its fight against offensive art.²¹⁴ It considers the destruction of the NEA its long-term goal. The AFA and its supporters believe that they have a moral and political duty to dissolve the NEA. Senator Helms articulated this belief, stating that the NEA

has been insulated from mainstream American values so long that it has become captive to a morally decadent minority which delights in ridiculing the values and beliefs of decent, moral taxpayers.

It should therefore be evident that as long as the NEA is given the sole authority to decide what is artistic—and thus not

210. *Id.* at 102-04.

211. Richard Huff, *Miramax Fights for Net-Nixed "Pope" Ads*, VARIETY, Sept. 2, 1991, at 9.

212. *See Matchbox Cuts off Freddy*, ADVERTISING AGE, Oct. 23, 1989, at 8.

213. *Firm Won't Market Its "Elm Street" Doll*, L.A. TIMES, Oct. 20, 1989, at F3. Judith Reisman, the Associate Director in charge of research for the AFA, also referred to a television program based upon the *A Nightmare On Elm Street* motion picture series as "junk" and "hardly high Shakespearean drama." Judith Reisman, *The Airwaves Are a Natural Resource Too*, WASH. TIMES, Oct. 12, 1989, at F5.

214. Selcraig, *supra* note 105.

obscene—the agency intends to continue to fund obscenity under the pretense that it is “art”—even when the taxpayers disagree.

Congress, at a minimum, should [allow] a panel of lay citizens—and not the self-appointed elitists at the NEA—to decide whether patently offensive works merit taxpayer funding.²¹⁵

The message of the AFA and other moral activists is indeed heard in Washington. On September 19, 1991, for example, the Senate, by a vote of 68 to 28, passed a bill sponsored by Senator Helms that placed strict constraints on NEA spending and prohibited funding of obscene material.²¹⁶ This non-binding bill was overwhelmingly approved in the House of Representatives by a 286-to-135 vote.²¹⁷ Fortunately for artists, however, Congress rejected binding bills that would have seriously restricted the types of art that the NEA would be permitted to fund.²¹⁸

Thus far, economic boycotts of the publishing industry have been limited to so-called “pornographic” magazines such as *Playboy*, *Penthouse* and *Hustler*. With the success of the Waldenbooks boycott, however, the future may bring similar boycotts of large chain-store booksellers. The financial structure of large publishing retailers is similar to that of the retail videocassette industry, against which economic boycotts have been effective in the past.

If, consistent with the recent trend, an increasing number of booksellers stop selling magazines and books that portray explicit nudity or sexual conduct, the moral activists are likely to begin protesting the publication of less explicit material. Reverend Wildmon has already attacked paperback novels.

The advertiser boycott became an effective weapon in the arsenal of moral activists and is not likely to disappear in the future. As evangelist Pat Robertson recently stated,

Rest assured that Christian groups during the 1990's will not long sit idly by while newspapers, magazines, television shows and motion pictures spew out Nazi-like venom against them, their leaders and their Lord. There will be more and more protests, picketing and massive economic boycotts against those who practice anti-Christian bigotry.²¹⁹

It is also possible that in the future the boycott may be used by free-

215. Philips, *supra* note 103.

216. Greg Evans, *NEA Buffeted by Helms*, *Frohnmayr*, VARIETY, Sept. 23, 1991, at 81.

217. *House Backs Restrictions on Arts Grants*, N.Y. TIMES, Oct. 17, 1991, at C21.

218. *Congress Kills Helms Effort to Censor NEA Grants*, PUB. WKLY., Nov. 22, 1991, at 15.

219. Philips, *supra* note 103.

speech activists. For example, a music-industry newsletter called *Rock and Roll Confidential* has "stag[ed] a series of rallies around the country to teach rock fans how to carry out a consumer boycott."²²⁰ The Southern California American Civil Liberties Union ("ACLU") has also launched a campaign to support companies that have been boycotted by moral activist organizations such as the AFA. Calling it a "boycott," the ACLU chapter has urged consumers to go out of their way to support boycotted companies.²²¹

Reverend Wildmon, apparently expressing the feelings of many activists, has stated that he is not merely against "dirty words and dirty pictures," but rather, "a philosophy of life which seeks to remove the influence of Christians and Christianity from our society."²²² Like others, he believes that "[p]ornography is not the disease, but merely a visible symptom. It springs from a moral cancer in our society, and it will lead us to destruction if we are unable to stop it."²²³ The moral activists are fighting a much larger fight than merely seeking to suppress art that offends them. Rather, this is just a small battle in their larger war against the "moral cancer" that they perceive in our society. Therefore, it is not likely that their battle against offensive art will end before the larger war is won.

220. *Id.*

221. Shanna Snow, *ACLU Starts a "Buycott" of TV Programs*, L.A. TIMES, Oct. 13, 1989, at F27.

222. Selcraig, *supra* note 105.

223. *Id.*